2002

State of Utah v. Clark Le Roy Bergeson : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff and Respondent, vs. CLARK LE ROY BERGESON Defendant and Appellant.	Case No. 20564

BRIEF OF APPELLANT

Appeal from Orders and Judgements of the First Judicial District Court for Box Elder County, The Honorable VeNoy Christoffersen and Omer J. Call, Judges

---

Thomas R. Blonquist
Attorney for Appellant
40 South Sixth East
Salt Lake City, Utah 84102

David L. Wilkinson
Attorney General for the
State of Utah
Attorney for Respondent
State Capitol
Salt Lake City, Utah

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS CONTINUED

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff and, Respondent, vs. CLARK LE ROY BERGESNON Defendant and Appellant.	Case No. 20564

BRIEF OF APPELLANT

NATURE OF THE CASE

The plaintiff charged that defendant had committed a second degree felony in the State of Utah. At arraignment, the defendant entered a plea of not guilty. After plea bargaining, the offense was reduced to a third degree felony and defendant withdrew his not guilty plea and entered a plea of guilty.

DISPOSITON OF THE LOWER COURT

Based upon the guilty plea of the defendant, the court entered a judgment that the defendant serve five (5) years in the Utah State Penitentary and suspended sentence upon the terms that the defendant enter into an agreement with Adult Probation and Parole to abide by the probation agreement and to serve six (6) months in the Box Elder County Jail.

In February of 1981, a motion to set aside sentence of court and resentence the defendant was heard and denied and in November of 1984 a motion to set aside the guilty plea was filed by the defendant and denied on February 26, 1985.

RELIEF SOUGHT ON APPEAL

Defendant, who appeals from the judgment of conviction entered upon his plea of guilty and the order denying the defendant's motion to set aside guilty plea, seeks the reversal of his conviction, enforcement of his plea bargain or the vacating of his sentence as detailed in the argument portion of this brief. In the alternative and in the event this court concludes that the record herein lacks facts essential to the proper and complete disposition of the case, defendant seeks remand to the District Court for an evidentiary hearing.

STATEMENTS OF ISSUES PRESENTED ON APPEAL

1. Whether the prosecutor adhered to his promise to recommend no incarceration.

2. Whether it was proper for the court to accept a guilty plea pursuant to a plea bargain and then sentence the defendant contrary to the plea bargain without giving defendant an opportunity to withdraw his guilty plea.

3. Whether defendant's guilty plea was voluntary.

4. Whether defendant was misled by the prosecutor into believing his plea bargain would be accepted by the court.

STATEMENT OF FACTS

After the defendant's not guilty plea to the second degree felony was entered, plea bargaining took place between the Deputy Box Elder County Attorney, Mr. Jon Bunderson, and defendant's counsel, Frank M. Wells. The agreement reached, according to defendant's counsel, is that the charge would be reduced from a second degree to a third degree felony and the county attorney would recommend to the court that the defendant be placed on probation with no incarceration. Mr. Bunderson told the defendant's counsel that the prosecutor's office would make a strong recommendation to the court that the defendant not be incarcerated and expressed the opinion that, while the recommendation of his office would not bind the court, he believed the court would not act contrary to the recommendation. Based upon this assurance, the defendant, on May 19, 1980, entered a plea of guilty to the reduced charge.

The transcript of the proceedings on the day the guilty plea was entered clearly shows that there was no meeting of the minds between the county attorney and defense counsel as to the agreement reached as a result of plea bargaining. The county attorney believed that the agreement was that a recommendation would be made that the defendant not be imprisoned and it was the understanding of defense counsel that the recommendation would be that the defendant not be incarcerated. (See transcript of the proceedings of May 19, 1980, page 4, lines 5 through 11.)

Believing that he had been betrayed by the county attorney and inadequately represented by his own counsel, the defendant did not surrender himself to the Box Elder County Sheriff on the date proscribed and, since that date, has been a fugitive from justice.

SUMMARY OF ARGUMENT

The defendant contends that the prosecutor promised to recommend to the court that the defendant not be incarcerated and be placed on probation if defendant would enter a guilty plea. At the time of the hearing, however, the prosecutor recommended that the defendant not be imprisoned at the Utah State Penitentiary. Based upon the failure of the prosecutor to meet his committment, it is claimed that the defendant's entry of a guilty plea was not voluntary and should be set aside, that the defendant should be allowed to enter a not guilty plea and the case should be remanded to the District Court for trial.

ARGUMENT

POINT I

THE PROSECUTOR PROMISED TO RECOMMEND TO THE COURT THAT THE DEFENDANT BE PLACED ON PROBATION WITHOUT INCARCERATION AND DID NOT DO SO

As set forth in the Statement of Facts above, the defendant withdrew his not guilty plea and entered a plea of guilty based upon the promise made by the prosecutor that he would recommend to the court that the defendant not be incar-

cerated and be placed on probation under an agreement with Adult Probation and Parole; however, at the time of the hearing, the prosecutor recommended that the defendant not be imprisoned at the Utah State Penitentary.

As a result of the failure of the prosecutor to fulfill his commitment, defendant is entitled relief under the authority of Santobello v. New York, 404 U.S. 257 (1971), and United States v. Brown, 500 F.2d. 374 (4th Cir. 1974). In both cited cases, convictions were reversed because of the failure of the prosecutors to adhere to their promises as to what they would recommend at the time of sentencing.

In Santobello v. New York, a new prosecutor apparently ignorant of his predecessor's commitment to refrain from making a sentencing recommendation instead recommended the maximum sentence of one (1) year for the defendant. The Supreme Court reversed the conviction. Mr. Chief Justice Berger, writing for the majority, stated:

> This phase of the process of criminal justice and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. 404 U.S. at 262.

In United States v. Brown, the defendant entered into a plea bargain whereby he pleaded guilty to the charge of possession of stolen mail in consideration for dismissal of a forgery

charge and a recommendation by the government that he receive a sentence of three (3) years to be served at Lorton concurrently with the unexpired portion of another sentence. He was, instead, sentenced to a term of four (4) years without recommendation that it be served at Lorton. At sentencing, a prosecutor other than the one who entered into the plea bargain merely brought the plea bargain to the attention of the court but made no recommendation as had been promised. The Court of Appeals reversed on the ground that the "Half-hearted" recommendation of the new prosecutor did not comply with the plea bargain and that it made no difference that defense counsel had brought the reasons for the plea bargain to the attention of the sentencing court. Holding that the effect on the sentencing court of the noncompliance with the plea bargain was "a matter into which we need not inquire," the Court of Appeals reversed and remanded for sentencing in accordance with the prosecutor's recommendation. Calling such action necessary for specific enforcement of the plea bargain to which the defendant was entitled, the court wrote:

> In determining significance of the prosecutor's failure to fulfill the promise contained in the plea bargain in Santobello, the Supreme Court did not inquire into the reasons for the breach; nor do we. We have no reason to think that the bargain was breached as a result of anything more than the failure of the first prosecutor in inform the second, and the second's complete candor in responding to the inquiry of the District Court. But in Santobello, hinging reversal on the breach of the agreement alone, the court attached no weight to the fact that the failure to comply with the plea bargain had been inadvertent.
>
> The staff lawyers in the prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach

> of agreement was inadvertent does not lessen its impact. 404 U.S. at 262, 92 S.Ct. at 499.
>
> The test established to be applied by us is thus an objective one - whether the plea bargain agreement has been breached or not - irrespective of prosecutorial motivations or justifications for failure in performance. 500 F.2d at 378.

The failure by the prosecutor to recommend to the court that defendant be placed on probation prior to the court entering judgment on defendant here went to the very heart of the plea bargain, namely that probation would be recommended and that the recommendation of the prosecutor would be accepted and enforced by the district court. In this respect, the prosecutor's lapse was even more basic than those in Santobello and Brown, which went to the content of the recommendation to the court. Therefore, the defendant here is entitled to the relief ordered by Santobello and Brown.

POINT II

IT WAS IMPROPER FOR THE DISTRICT COURT TO ACCEPT A GUILTY PLEA PURSUANT TO A PLEA BARGAIN AND THEN SENTENCE CONTRARY TO THE PLEA BARGAIN WITHOUT GIVING DEFENDANT AN OPPORTUNITY TO WITHDRAW HIS PLEA

Defendant's counsel and the prosecutor engaged in negotiations culminating in a plea bargain whereby defendant pleaded guilty. Under these circumstances, the court should have been advised of the plea bargaining. The court would thereafter be obliged to follow the prosecutor's recommendation or inform defendant that it would not do so and allow him an opportunity to

withdraw his plea. The failure of the court to permit defendant to withdraw his plea of guilty requires this court to vacate defendant's sentence and remand the case for sentencing in accordance with the prosecutor's recommendation. See Santobello v. New York and United States v. Brown.

POINT III

DEFENDANT'S CHANGE OF PLEA WAS BASED UPON THE ASSURANCES OF THE PROSECUTOR AND WAS, THEREFORE, NOT VOLUNTARY

At the time that defendant withdrew his not guilty plea and entered a plea of guilty, the court asked the defendant if he had been promised anything if he entered a plea of guilty. The court also asked the defendant if he understood that the court was not bound by agreements made between the prosecutor and defense counsel. (Transcript of Proceedings P.4)

The ritual assertion by the court that it was not bound by the plea bargain does not offset an otherwise misleading impression. This was the holding in Walters v. Harris, 460 F.2d 988 (4th Cir. 1972), cert. denied, 409 U.S. 1129 (1973). Walters, a petitioner under 28 U.S.C. Section 2255, claimed that he was induced into pleading guilty by the prosecutor's unkept promise that he would receive a ten-year sentence and that he had been sentence to twenty-years in prison instead. This court stated:

> If Walters was in fact promised by the Assistant United States Attorney that he would receive a ten-year sentence, he is entitled to relief. United States v. Carter, 454 F.2d. 426 (4th Cir. 1972). Sentencing Walters was within the authority of no one but the trial judge. An assurance by another that Walters would receive a particular sentence, therefore, would be a promise that could not be kept. An unkept bargain which has induced a guilty plea is grounds for relief. Santobello v. New York, 404, U.S. 257, 92 S.Ct. 495, 30 L.Ed 2d 427 (1971). 460 F.2d at 991-92.

At arraignment, the trial court questioned Walters closely as to whether anyone had made any promises to him. The Court then asked:

> THE COURT: Do you fully understand that the court, and the court alone, is responsible under the law for any sentence that is imposed upon a defendant who pleads guilty or if found guilty, do you fully understand that?
>
> DEFENDANT: Yes, sir. Id. at 992.

As to the significance of the quoted question and answer, the court stated:

> It is doubtful that the trial judge's instruction that the length of Walters' sentence was within his sole control would have eradicated the effect of the prosecutor's alleged promise to Walters. Ibid.

The court of Appeals reversed and remanded the case for further factual inquiry by the district court.

POINT IV

DEFENDANT WAS MISLEAD BY THE PROSECUTOR INTO BELIEVING HIS PLEA BARGAIN WOULD BE ACCEPTED BY THE COURT

As detailed in the Statement of Facts above, defendant was mislead by the prosecutor into believing that the court would

accept his plea bargain. As a result of the misleading impression which was conveyed to him, defendant entered his plea of guilty. The actions of the prosecutor require the specific enforcement of defendant's plea bargain as set forth in Clemons v. United Sates, 137 F.2d 302 (4th Cir. 1943). In Clemons, the defendant was assured by an Assistant United States Attorney that the indictment on which he went to trial charged only a misdemeanor and that the maximum sentence was one (1) year. The trial judge, however, construed the indictment as charging a felony and, after conviction, imposed a sentence of four (4) years. On appeal, the court of appeals held that the prosecutor's assurances to the defendant as to the possible future punishment in the event of conviction required reversal and, in addition, rejected the government's argument that the defendant was not prejudiced since he was convicted after trial. The court wrote:

> It may well be that Clemons and his counsel acted a bit precipitately in accepting this assurance at its face value and in proceeding accordingly. It does not follow that they, therefore, acted altogether unreasonably. Certainly, the whole procedure smacks of surprise, which should if possible be avoided.
>
> A criminal trial is not, of course, to be likened to a game. . . We think accordingly, that Clemons, under the circumstances of this case, was deprived of his liberty against the spirit, if not the letter, of the Due Process Clause of the Constitution of the United States. We think he has been dealt with unfairly in the light of our standards of justice towards those accused of federal crimes - standards, in our opinion, which the courts must always adequately safeguard and must, under all circumstances, zealously protect. 137 F.2d. at 305-306.

CONCLUSION

As a result of the errors commited below, defendant respectfully submits that he is entitled to relief as follows:

ERROR	RELIEF
I. Failure of Prosecutor to Recommend Probation	Set aside defendant's guilty plea and sentence; in the alternative, remand for an evidentiary hearing.
II. Failure to Sentence Defendant in Accordance with Plea Bargain	Specific enforcement of plea bargain; in the alternative, remand for an evidentiary hearing.
III. Defendant's Change of Pleas was Not Voluntary	Set aside defendant's guilty plea and sentence; in the alternative remand for an evidentiary hearing.

Respectfully submitted,

THOMAS R. BLONQUIST
40 South Sixth East
Salt Lake City, Utah 84102

ADDENDUM

Accompanying this brief are the two orders sought to be reviewed. They are:

1. Order Denying Motion To Set Aside Sentence, dated May 21, 1981

2. Order Denying Defendant's Motion To Set Aside

Guilty Plea, dated February 20, 1985

CERTIFICATE OF DELIVERY

I hereby certify that I delivered ~~two (2)~~ four (4) true and correct copies of the foregoing Brief of Appellant to:

David L. Wilkinson
Attorney General for the
State of Utah
State Capitol
Salt Lake City, Utah 84114

this 15th day of November, 1985.

Thomas R. Blonquist

Attorney at Law
45 North First East
Brigham City, Utah
Telephone: 734-9464

IN THE FIRST DISTRICT COURT OF BOX ELDER COUNTY

STATE OF UTAH

STATE OF UTAH Plaintiff	:	ORDER DENYING MOTION TO SET ASIDE SENTENCE
vs.		
CLARK LEROY BERGESON Defendant.	:	Criminal Number 1940

Defendant in this matter has filed a Motion To Set Aside the Sentence of the Court, seeking a resentencing of the defendant. Plaintiff filed a Memorandum in Opposition thereto, and pursuant to stipulation of the parties, defendant was granted time to respond to the plaintiff's memorandum, and the time now having expired, and the matter having therefore been submitted by the parties for decision, and based upon the files and records of the Court, and the Motions and Memorandums of the parties, and good cause appearing therefore, it is hereby ordered, adjudged, and decreed as follows:

1. The Court finds the sentence to be legal and proper, and therefore denies defendants motion.

Dated this 22nd day of May, 1981.

/s/

VeNoy Christerfofferson, District Judge

I hereby certify that I mailed a true and correct copy of the foregoing Order Denying Motion to Set Aside Sentence to Mr. Thomas R. Blonquist, Attorney for the defendant, Second Floor, Metropolitian Law Building, 431 South 3rd East, Salt Lake City, Utah 84111, postage prepaid, this 27th day of May, 1981.

Secretary

THOMAS R. BLONQUIST A0369
Attorney for Defendant
40 South Sixth East
Salt Lake City, Utah 84102
Telephone: (801) 5330525

IN THE FIRST JUDICIAL DISTRICT COURT FOR BOX ELDER COUNTY

STATE OF UTAH

STATE OF UTAH,	)	
Plaintiff,	)	Criminal No. 1940
v.	)	ORDER DENYING DEFENDANT"S MOTION TO SET ASIDE
CLARK LE ROY BERGESON,	)	GUILTY PLEA
Defendant.	)	

The above matter came before the Court pursuant to the Motion of the Defendant to Set Aside Guilty Plea. Plaintiff was represented by John J. Bunderson and Defendant was represented by Thomas R. Blonquist. The matter was submitted to the Court on memorandums and having taking the matter under advisement to consider the material submitted by the parties and having done so and being fully advised in the premises, the Court issued a Memorandum Decision on January 9, 1985, and based thereupon and good cause appearing therefor

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Set Aside Guilty Plea be and the same hereby is denied.

DATED this 26th day of February, 1985.

BY THE COURT:

/s/
OMER J. CALL -DISTRICT JUDGE

The undersigned hereby declares that he caused a copy of the foregoing to be mailed, postage prepaid, to John Bunderson, Attorney at Law, 45 North First East, Brigham City, Utah 84302 this 11th day of February, 1985.